Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

EDDY POTASH, INC.,

Petitioner,

v.

JEANNE HARRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should an employer be vicariously liable for supervisor sexual harassment where:

a. A reasonable employer has received a complaint from an employee in a reasonable time period and the employer promptly and reasonably acts to remedy the harassment?

(or stated in an alternative manner)

b. If an employer has in place reasonable preventive and corrective opportunities, of which the alleged victim reasonably avails herself/himself, should the employer be able to escape vicarious liability for a supervisor's sexual harassment?

(and)

c. Should the *Ellerth/Faragher* affirmative defense be clarified to address the issue stated in Ia and Ib above.

(or)

d. Should the *Ellerth/Faragher* affirmative defense be modified to allow an employer to escape liability for a supervisor's creation of a hostile work environment by proving both of the following elements: (1) the employer exercised reasonable care by creating and maintaining preventative and remedial programs relating to sexual harassment; and (2) the employer exercised reasonable care in responding to notice that harassment has occurred, thereby encouraging the employer to deal with harassment before, while, and after it occurs?

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Petitioner, Eddy Potash, Inc, (*EPI*), respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit (*Tenth Circuit*) entered April 30, 2001.

OPINIONS BELOW

The opinion of the Tenth Circuit is officially reported at 248 F.3d 1014, 85 Fair Emp.Prac.Cas.(BNA) 990, 80 Empl.Prac.Dec. ¶ 40,506, 2001 DJCAR 228 (10th Cir. (NM) April 30, 2001). The Tenth Circuit's published opinion is reproduced in the Appendix filed with this Petition for Writ of Certiorari. (Appendix A, p. 1a)

STATEMENT OF JURISDICTION

The Tenth Circuit entered its judgment on April 30, 2001. On May 31, 2001, the Tenth Circuit entered its Order denying EPI's Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a), the relevant portions of the statute is set forth, *infra*, at Appendix D, p. 32a.

STATEMENT OF THE CASE

A. Introduction

Following years of massive amounts of litigation and heated debate regarding when an employer may be vicariously liable for a supervisor's sexual harassment of an employee, this Court, in 1998, issued two decisions, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) *(Ellerth/Faragher)*. The two cases created strict liability in the hostile work environment context unless the employer can establish an affirmative defense crafted by this Court in those decisions. The affirmative defense comprises two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. The affirmative defense is not available when the supervisor's harassment

culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. The subsequent case law dealing with the *Ellerth/Faragher* affirmative defense evidence, ongoing confusion and uncertainty as to its application and whether it has addressed all situations that might arise. Division exists between the courts regarding the affirmative defense as to its clarity and application to certain situations, such as the one presented in the this case. Legal commentators in articles contained in law reviews and journals are seriously questioning whether the affirmative defense is in fact achieving the goals sought by this Court in *Ellerth/Faragher*. As one legal commentator has stated:

> **Unfortunately, the majority opinions in *Faragher* and *Ellerth* do not resound with clarity as to exactly what an employer must do to escape liability for sexually harassing behavior by a supervisor. . . . *Faragher* and *Ellerth* do little more than create confusion and an abundance of litigation, which has and undoubtedly will continue in the lower courts. Even deeper than the rift between the Supreme Court's majority and dissenters is the split between the circuits as to what is reasonable versus what is unreasonable. . . .**

"Let's be Reasonable" — Resolving the Ambiguities of the Faragher-Ellerth Affirmative Defense, 68 Def. Couns. J. 211 (April 2001). Among the issues encased in uncertainty and lack of clarity is the question of the availability of protection to a reasonable employer who receives a reasonable complaint and promptly remedies the harassment.

The problem that has manifested itself may be best characterized by the following illustration:

> Assume an employer has a policy against sexual harassment in place. Further assume a wayward supervisor has sexually harassed a female employee and the female employee has promptly reported the

> harassment to the employer. Following the report, the employer promptly investigates the allegations of sexual harassment. The investigation results in disciplinary action being taken against the supervisor. In spite of the employer's having an anti-harassment policy in place which it has promptly and properly enforced, the female employee who had also promptly reported the harassment files suit under Title VII.

The question that arises from the illustration is whether the employer should be held vicariously liable and whether *Ellerth/Faragher* actually address such a situation and, if they do, how should the affirmative defense be applied. The other question that arises is whether the *Ellerth/Faragher* affirmative defense should be modified to deal with such a situation. The facts present in this case involving Jeanne Harrison, the employee, and EPI, the employer, fall squarely into the realm of uncertainty remaining from *Ellerth/Faragher* regarding the application of the affirmative defense.

B. Facts

EPI operated an underground potash mine near Carlsbad, Eddy County, New Mexico. The Defendant, R. L. Brown (*Brown*), was a low-level supervisor with the responsibilities of a shift foreman and face boss. The position of face boss is the lowest supervisory level at EPI. EPI had combined the duties of an underground shift foreman and face boss. Brown, as the shift foreman, had no authority to hire, no authority to fire, and no authority to discipline. The extent of Brown's authority as an underground shift foreman/face boss was to make work assignments for members of his crew and pair members of his crew to accomplish those work assignments. Brown had no involvement other than reporting the infraction to upper-level management. EPI's decision as to the appropriate level of disciplinary action to be invoked was made by a committee or group of upper-level management personnel. Brown, as an underground shift foreman/face boss, was not a member of,

nor participant in, the group. Brown, as an underground shift foreman/face boss, had no authority to determine who was assigned to his crew or what work was to be done. Those decisions were controlled by upper level management. The extent of Brown's authority was to pair the workers assigned to his crew and to delegate the paired workers to the tasks to be accomplished.

The Respondent, Jeanne Harrison (*Harrison*), began working for EPI as an underground potash miner in May of 1992. Harrison was assigned to Brown's crew. As an underground potash miner, Harrison participated in the "buddy system." The buddy system was one in which each miner was assigned another laborer. The two then worked together within a section of the mine away from other members of his or her crew. If a miner was not assigned a "buddy" on a particular shift, he or she was designated the extra person and was typically assigned to perform miscellaneous duties. Beginning in November, of 1992, Brown began engaging in giving Harrison "hugs." On May 5, 1993, Harrison was working with her regular partner when Brown drove up with a replacement "buddy" for Harrison and requested that Harrison accompany him to get some supplies. On the way to get the supplies, Brown stopped the vehicle in which they were riding and engaged in sexual activity with Harrison. Again, on May 15, 1993, Brown came to the place where Harrison was working and requested that Harrison go with him to locate a part that the mechanic needed to fix a piece of broken machinery in Harrison's section. On the way to obtain the part, Brown again stopped the vehicle in an isolated area of the mine and engaged in sexual activity with Harrison. On May 24, 1993, Harrison accompanied Brown to check on methane readings and to make sure an area where methane was present was properly curtained off. During this trip, Brown engaged in sexual activity with Harrison. On June 7, 1993, Harrison was helping Brown deliver a load of supplies to a machine. On the way to delivering the supplies, Brown stopped the vehicle and engaged in sexual activity with Harrison. Finally, on June 27, 1993, Brown requested Harrison accompany

him to shovel materials in tunnels in the mine. On the way there, Brown attempted to engage in sexual activity with Harrison and Harrison refused. Brown made no further attempts to engage in sexual activity and drove Harrison back to continue the work that she was performing when he picked her up. Later that same day, Harrison assisted Brown in the task of cleaning his office. At that time, Brown and Harrison engaged in sexual activity.

It is undisputed that in all of these incidents, Brown never used his authority to threaten or coerce Harrison into engaging in any of the activities. It is likewise undisputed that Brown never conditioned tangible job benefits on Harrison's submission to the sexual activity. During the June 27, 1993 incident, Harrison refused Brown's request. Brown abided by her wishes and no sexual activity occurred at that time.

On June 28, 1993, Harrison called the line foreman and told him she was having some problems and needed to take some vacation days to finish out the remainder of her 11-day shift. The next scheduled work day, Harrison called in sick. She did the same the following day. On July 7, 1993, Harrison called Dale Janway (*Janway*), the manager of EPI's Safety Office, and told him of the activities that had been occurring with Brown. Janway immediately contacted Kenneth Leivo (*Leivo*), EPI's Human Resources Manager. Leivo immediately began an investigation. Leivo telephoned Harrison and informed her that she would be on administrative leave with full pay and benefits pending the outcome of the investigation. Leivo also asked Harrison to prepare a written statement outlining what had happened. During the course of Leivo's investigation, he contacted Harrison several times on the telephone. Leivo interviewed Brown regarding Harrison's allegations. Brown had claimed the relationship was consensual. Though admitting she never orally told Brown she did not want to engage in the sexual activities, Harrison contended the relationship was not consensual. There were not any third party witnesses of any nature. EPI was left with a credibility issue as between Brown and Harrison. On July 14, 1993, seven days after the complaint

was first received, Leivo issued a three-page determination and disposition outlining his conclusions resulting from his investigation. As a result of EPI's investigation, Brown was formally reprimanded for his involvement in the incident and was placed on permanent probation for the rest of his work life at EPI. Further, Brown was prohibited from having any contact whatsoever with Harrison. Harrison was transferred from Brown's crew to another work crew in a separate portion of the mine. Harrison never returned to work. However, Harrison remained on EPI's payroll for approximately one year. Harrison had claimed she was incurring emotional problems as a result of the sexual encounters with Brown. EPI paid all medical bills for Harrison during the ensuing 12 months. On June 17, 1994, Harrison's employment was terminated due to a reduction in force occasioned by economic conditions in the potash industry. Because of Harrison's lack of seniority, she was permanently laid off from work at EPI.

At all times material to this case, EPI had a written policy against sexual harassment in effect. The sexual harassment policy was drafted and adopted in 1989. It had been disseminated throughout the mine. It was posted on all bulletin boards where any employee wishing to read it had the opportunity to read such policy. Kenneth Leivo, the Human Resources Director who drafted the policy, testified the policy was posted on bulletin boards throughout the mine including the area in which Harrison worked. Brown testified that he had seen the written sexual harassment policy, it was presented to crews in 1989 and he had posted the policy on the bulletin board in the area in which Harrison worked. Harrison testified that she had never been handed a copy of the policy at the time she was hired nor had she been given any training regarding the policy. Harrison said the policy was not on the bulletin board in the area of the mine where she worked. Upon cross-examination, she admitted she was not sure whether the policy was or was not posted on that particular bulletin board. However, during the time period these incidents with Brown were occurring, Harrison acknowledged

seeing the written sexual harassment policy posted on another bulletin board. She testified she only glanced at it and did not read it. She admitted that she did not read the confidentiality portion of the policy. Even after seeing the policy, Harrison still failed to report the incidents and did not report new incidents until the last incident on June 27, 1993, over one month and three weeks after the first incident. Even though Harrison testified she had not initially been given the policy when hired by EPI and that she had not seen the policy until a time period after the incident began to occur, she acknowledged, based on her work experience, that she knew sexual harassment was illegal and that if a company found out about it, they would generally take steps to correct or address the issue.

It is undisputed EPI's sexual harassment policy was actively enforced by management. Immediately upon Harrison's complaining of the sexual activities with Brown, EPI took immediate and effective corrective action. No further harassment occurred after Harrison brought her complaints to management. Also, Harrison acknowledged seeing the written sexual harassment policy posted on the bulletin board during the time in which these incidents were occurring, though she claims she never read it.

At trial,[1] Harrison testified to a series of encounters with Brown which occurred intermittently over a period time from November, 1992, through June 27, 1993. The encounters had begun with Brown hugging her and culminated in actual sexual encounters which occurred between May 5, 1993, and ended with the last incident on June 27, 1993, Harrison never complained to anyone at any level of management at EPI about Brown's actions. Harrison testified her reasons for not complaining to management were (1) she was fearful no one

1. As will be explained in the Proceedings section of this Petition, the trial being referred to in this paragraph is the second trial which followed this Court's vacating the first Decision of the Tenth Circuit and thereafter, the Tenth Circuit's remand to the District Court for trial on the issue of whether EPI is entitled to the *Ellerth/Faragher* affirmative defense.

would believe her; (2) EPI would do nothing about the alleged problem; (3) that she would be fired because she was already on probation for missing work; and (4) that telling someone about the incidents was humiliating and degrading. On cross-examination, Harrison acknowledged her reasons for not complaining were generalized fears that she just generally felt.

C. Proceedings

On September 16, 1994, Harrison filed a Complaint against EPI and Brown in the United States District Court for the District of New Mexico alleging sexual harassment in violation of Title VII and a number of supplemental state law tort claims. Subject matter jurisdiction in the District Court over these claims was alleged to be under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. A week-long jury trial was conducted with a verdict being returned in favor of EPI and against Harrison on February 7, 1996. The jury also returned a verdict in favor of Harrison and against Brown on state common law tort claims for battery and intentional infliction of emotional distress, but declined to impose liability against EPI for Brown's actions. (*It should be noted, the sexual harassment question submitted to the jury involved only a claim of hostile working environment and no claim of quid pro quo harassment. Harrison had agreed there was no basis for a quid pro quo claim.*) On February 27, 1996, Harrison filed her Notice of Appeal to the Tenth Circuit. On May 8, 1997, the Tenth Circuit issued its decision reversing and remanding the District Court's judgment with the direction that the District Court give a different jury instruction concerning § 219(2)(d) of the Restatement (Second) of Agency. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 156 L.R.R.M. (BNA) 2033, 73 Fair Empl.Prac.Cas. (BNA) 1384, 70 Emp. Prac. Dec. ¶44,689, 65 USLW 2799, 97 CJ C.A.R. 674 (10th Cir. 1997) (*Harrison I*). EPI then petitioned this Court for a *Writ of Certiorari* which was granted. This Court summarily vacated the decision in *Harrison I* and remanded the case to the Tenth Circuit for further consideration in light of the *Ellerth/Faragher* decisions. *Eddy Potash, Inc. v. Harrison*, 524 U.S. 947 (1998)

(Docket No. 97-232) On remand, the Tenth Circuit again decided the District Court had improperly instructed the jury with respect to the standards for imposing vicarious liability upon an employer for sexual harassment perpetrated by one of its supervisors. *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371 (10th Cir. 1998) (*Harrison II*). The Tenth Circuit remanded the case to the District Court for trial on the issue of whether EPI is entitled to the *Ellerth/Faragher* affirmative defense.

Following the remand, a second jury trial was held on the issue of whether EPI was vicariously liable and whether EPI was entitled to the *Ellerth/Faragher* affirmative defense. At the close of the second trial, based upon undisputed evidence regarding EPI's actions, EPI requested the Trial Court submit the following instruction to the jury.

DEFENDANT'S REQUESTED INSTRUCTION NO. 7

> **You are instructed that if you find that Plaintiff Jeanne Harrison promptly complained of Robert L. Brown's harassing conduct and that Eddy Potash promptly responded, disciplined appropriately, and stopped the harassment, then you should find for Eddy Potash.** (Appendix E, p. 33a)

The Trial Court refused to submit the instruction. The Trial Court submitted its Instruction Number 5 which read:

> **Defendant Eddy Potash, Inc. is liable for Robert L. Brown's sexual harassment of Plaintiff Jeanne Harrison unless Defendant Eddy Potash can prove each of the following elements of its defense by a preponderance of the evidence:**
>
> **First:** **Defendant Eddy Potash exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and**
>
> **Second:** **Plaintiff Jeanne Harrison unreasonably failed to take advantage of any preventive or**

> **corrective opportunities provided by Defendant Eddy Potash or to avoid harm otherwise.**
>
> **If you find that Defendant Eddy Potash has met its burden of proving both of these matters by a preponderance of the evidence, then you should find for Defendant Eddy Potash.**
>
> **If, on the other hand, you find that Defendant Eddy Potash has not met its burden of proving both of these matters by a preponderance of the evidence, then you should find for Plaintiff Jeanne Harrison.** (Appendix E, p. 33a)

The jury returned a verdict in favor of Harrison and against EPI on the issue of EPI being vicariously liable for Brown's sexual harassment of Harrison. EPI appealed to the Tenth Circuit. On April 30, 2001, the Tenth Circuit rendered its decision affirming the District Court. (Appendix 1a) In its opinion, the Tenth Circuit ruled: (1) That EPI was not entitled to its requested jury instruction Number 7 because the second prong of the *Ellerth/Faragher* affirmative defense requires the complaining employee wait an unreasonable period of time before availing herself of preventive or corrective opportunities. The Tenth Circuit stated that *Ellerth/Faragher* had, in a straight forward manner addressed the issue. The Tenth Circuit refused to adopt the concept that where both the employer and the employee had acted reasonably, the employer should not be liable. (Appendix A, p. 1a)

Following the receipt of the April 30, 2001 Tenth Circuit decision, EPI filed a Petition for Rehearing. The Tenth Circuit denied that Petition on May 31, 2001. (Appendix C, p. 30a)

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER AN EMPLOYER SHOULD BE HELD VICARIOUSLY LIABLE WHERE THAT EMPLOYER HAS ACTED REASONABLY AND THE EMPLOYEE HAS ACTED REASONABLY BY PROMPTLY COMPLAINING OF THE HARASSMENT (AVAILING ONESELF OF AVAILABLE PREVENTATIVE OR CORRECTIVE MEASURES) SHOULD BE ADDRESSED BY THIS COURT

With the creation of the two-prong affirmative defense, *Ellerth/Faragher* results in a regrettable situation where employers are held liable when they do all that they can to prevent sexual harassment, which nonetheless occurs and the employee reports it. They are liability free, however, when they do a lesser job of preventing harassment, and they happen to be fortuitous enough to employ someone who fails to take reasonable steps to report his or her claim.

The *Ellerth/Faragher* decisions are an attempt to carry out the intent of Title VII, which is to alleviate sexual harassment in the workplace. Unfortunately, the affirmative defense crafted in the decisions is imprecise and unclear. It is arguable that the affirmative defense does not address issues presented in this case. If the affirmative defense addresses the issues in this case, then the application of the affirmative defense creates a result opposite of the announced goal in *Ellerth/Faragher*. The affirmative defense actually creates a disincentive for the employer to vigorously set up policies against harassment and enforce those policies. The affirmative defense should be modified or re-crafted to put the burden, and reward, upon the employer for reasonable compliance. Such a modification will best achieve the goals of Title VII which is to have a workplace free of sexual harassment and in this way, the employee will likewise benefit. For the following reasons, this Court should grant EPI's petition for a Writ of Certiorari:

1. The question presented by EPI to the District Court, the Tenth Circuit, and now to this Court is of such great

importance to the federal law that this Court should address the issue. The issue arises directly out of this Court's decisions in *Ellerth/Faragher*. The *Ellerth/Faragher* decisions have had impact on every employer in the United States. Those decisions addressed the issue of vicarious liability of an employer for its supervisor's sexual harassment, which was, and is, an issue of nationwide importance. It cannot be of any less importance to address issues arising from the *Ellerth/Faragher* decisions where there is a great lack of clarity, confusion and much uncertainty in how to apply the *Ellerth/Faragher* affirmative defense. It is important to have this Court re-examine the affirmative defense because it is becoming ever more clear that the affirmative defense is having an impact that discourages employer aggressiveness in combating sexual harassment in the workplace.

2. Though the *Ellerth/Faragher* decisions are relatively new, the lack of clarity and uncertainty in the application of the affirmative defense has led to uncertainty and conflict in the circuits. Legal scholars who have recently examined the affirmative defense have called for a re-examination and modification of the affirmative defense. Because it is of extreme importance to have consistency in labor and employment policy throughout this country, this Court needs to resolve the inconsistencies by revisiting, clarifying and, if necessary, modifying the *Ellerth/Faragher* affirmative defense.

II. THE *ELLERTH/FARAGHER* AFFIRMATIVE DEFENSE (1) FAILS TO ADDRESS THE ISSUE OF VICARIOUS LIABILITY WHERE THE EMPLOYER HAS ACTED PROPERLY AND REASONABLY AND (2) DEFEATS THE GOAL OF ENCOURAGING EMPLOYER ACTION TO PREVENT SEXUAL HARASSMENT BY IMPOSING LIABILITY UPON AN EMPLOYER WHERE IT HAS ACTED REASONABLY AND THE EMPLOYEE HAS LIKEWISE ACTED REASONABLY, BUT CONVERSELY, LEAVING THE EMPLOYER NOT VICARIOUSLY LIABLE WHERE THE EMPLOYEE HAS NOT ACTED REASONABLY

The *Ellerth/Faragher* decisions recognize the laudable goal of imposing responsibilities upon both the employer and the employee to take action to prevent sexual harassment in the workplace. The cases recognize the goal of Title VII is prevention of harassment, not simply imposition of liability upon an employer through litigation. Unfortunately, the affirmative defense has created increased difficulties and uncertainties that are now becoming clear and are the subject of ever increasing commentary by courts and legal scholars. The *Ellerth/Faragher* decisions are not clear as to exactly what an employer must do to escape liability for the sexually harassing behavior of a supervisor. In *Barrett v. Applied Radiant Energy*, 70 F. Supp.2d 644 (W.D. Va. 1999), *aff'd in part, vacated in part*, 240 F.3d 262, 85 Fair Empl.Prac.Cas. (BNA) 253, 80 Emp.Prac.Dec. ¶40,418 (4th Cir. (Va.) Feb. 13, 2001) (Number 99-2597, 99-2634), the District Judge stated: "No court has sought to establish a bright line as to what is or is not reasonable as the term is contemplated in *Faragher* and *Ellerth*." In a series of law review and law journal articles, the *Ellerth/Faragher* affirmative defense has been closely scrutinized and severely criticized with calls for this Court to clarify and modify the affirmative defense. Because the articles calling for clarification or modification of the *Ellerth/Faragher* affirmative defense address fundamental principles of federal law and the goals of Title VII, the various articles' analysis and criticism of the

Ellerth/Faragher affirmative defense merit review. Each shows the need for this Court to grant EPI's Petition and address the issues raised in this case.

A. *Defense Counsel Journal Article (April, 2001)*

In an article entitled *"Let's be Reasonable" — Resolving the Ambiguities of the Faragher/Ellerth Affirmative Defense,"* 68 Def. Counsel J. 211 (April, 2001), the author argues that if an employer has acted reasonably to stop and correct supervisor harassment, the employer should be entitled to the defense of having acted reasonably. The author observes that in addition to the lack of clarity in the affirmative defense, employers' chances of prevailing are limited because the reasonableness standard set by the Court is generalized and aspirational. The affirmative defense not only creates additional litigation but also deals a blow to judicial economy. Because Title VII is a federal question claim, and many defendant employers are subject to in personam jurisdiction in multiple jurisdictions, the lack of a uniform standard of reasonableness and liability allows plaintiffs to forum shop for the interpretation most favorable to their case. A uniform pronouncement of a specific standard of vicarious liability for sexual harassment would eliminate much confusion and restore judicial economy without threatening due process.

The Defense Counsel Journal article points out that, in particular, the second prong of the affirmative defense is of utmost importance in showing the problems with the affirmative defense. The second prong of the affirmative defense places a responsibility upon the employee being subjected to sexual harassment to complain within a reasonable time and if the employee fails to do so, the employee cannot impose vicarious liability upon the employer. Because the primary objective of Title VII is not to provide redress, but to avoid harm, it is a victim's duty to mitigate damages and avoid harm altogether when possible. If the victim could have avoided harm, the employer, who had taken reasonable care to avoid such harm but for the victim's actions, should escape liability. Yet, under

the affirmative defense that does not happen, the opposite occurs. The author argues it is logical that when an employer with reasonable measures to prevent and correct promptly sexually harassing behavior, of which the alleged victim reasonably avails herself, promptly corrects such behavior, the employer should escape vicariously liability. The *Ellerth/Faragher* decisions noticeably omitted addressing the issue.

The author argues that although this Court did not clearly enunciate a rule regarding the effect on an employer's liability of prompt and effective corrective action when both the employer and the alleged victim have acted reasonably, there should be an amendment to the affirmative defense that makes such corrective action a complete defense to liability. The author proposes adoption of the rule that when an employer independently remedies a hostile working environment, thereby ridding its workplace of sexual harassment in accordance with Title VII, a plaintiff employee should not be entitled to recovery under Title VII, because Title VII's goal is the end to discrimination in employment, not the provision of personal compensation. The author argues this approach would not only reward employers who comply with Title VII in good faith, but it also would alleviate some of the strain on the justice system.

Justice Thomas's dissent anticipated such a problem with the affirmative defense not addressed by *Ellerth/Faragher* Court in that, "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care. In practice, therefore, employer liability may well be the rule. But as the Court acknowledges, this is one result that it is clear Congress did not intend." The problem so accurately predicted by Justice Thomas must be addressed and corrected to successfully carry out the goals of Title VII.

B. *University of San Francisco Law Review Article (Spring 2001)*

In an article entitled, *Indest v. Freeman Decorating, Inc.: Dealing with Vicarious Liability for Sexual Harassment by a*

Supervisor, Daniel N. Raytis, 35 U.S.F.L. Rev. 623 (Spring 2001), the author criticizes the current affirmative defense and offers an alternative that he argues would better achieve Title VII's goals. The author uses a hypothetical fact pattern equivalent to the situation involving Harrison and EPI in this case. The author concludes that under the *Ellerth/Faragher* affirmative defense, the employer would be liable even though both the employer and the employee had acted reasonably. This is because an employee who has acted reasonably in reporting harassing conduct eliminates the possibility of the employer proving the second element of the affirmative defense, which makes the first element of the affirmative defense, an employer's conduct to prevent or remedy a harassing situation, irrelevant.

This Court in *Ellerth* stated that "[w]ere employer liability to depend in part on an employer's effort to create [grievance] procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." The author points out that ironically, a strict application of the affirmative defense established in *Ellerth/Faragher* would have the opposite result. An employee who acts reasonably in reporting harassing conduct, thereby destroying the employer's ability to prove the second element of the affirmative defense, will be encouraged to litigate. In regard to the second element of the affirmative defense, this Court reasoned, "[t]o the extent [that] limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." The author also concludes that while this element encourages employees to report harassing conduct after it has already occurred, it does not appear to deter harassing conduct before it occurs. In fact, it may actually deter employers from creating effective grievance policies, because the more effective a company policy is in encouraging an employee to report harassment, the less likely an employer will be able to prove the second element of the affirmative defense.

In essence, this Court is asking employers to create policies that will leave them vicariously liable if harassment does occur. An analysis of the affirmative defense supports that conclusion. In order to escape vicarious liability, an employer must prove both of the following elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." The crux of the problem involves the second element, and the fact that this Court requires the employer to prove the existence of both elements. When an employee promptly reports a harassing situation, the first element of the defense becomes irrelevant, because the employer will be unable to establish the second element. Therefore, in nearly all situations where a harassed employee reports the conduct, or "avoids harm otherwise," the employer will be automatically liable, a result this Court claimed it was seeking to avoid.

The author proposes an alternative to the current affirmative defense. Under the proposed alternative defense, an employer could escape liability for a supervisor's creation of a hostile work environment by proving both of the following elements: (1) the employer exercised reasonable care by creating and maintaining preventative and remedial programs relating to sexual harassment; and (2) the employer exercised reasonable care in responding to notice that harassment has occurred. Because this alternative approach focuses primarily on the behavior of the employer, it does not permit the situation created by the *Ellerth/Faragher* defense, where the actions of an employee alone effectively eliminate the possibility of the employer proving the elements of the affirmative defense. The proposed alternative defense focuses on the actions of the employer, the party most effectively equipped to deal with harassment, thereby encouraging the employer to deal with harassment before, while, and after it occurs. The author argues the proposed alternative defense would urge both the employer and the employee to act reasonably, and would reward both for

their respective conduct. Unlike the *Ellerth/Faragher* defense, the second element of the proposed defense focuses on the employer's response to the employee's notice of harassment rather than the employee's actions.

The author argues, and EPI agrees, that this proposed defense also demonstrates how it would both serve the deterrence goals of Title VII and promote conciliation rather than litigation. The first element, proof of reasonable programs dealing with sexual harassment, encourages the employer to create and maintain sexual harassment programs that will be likely to have a deterrent effect. Because the employer's liability would partially be determined by the effectiveness of it's programs under the second element, the alternative proposed defense will promote conciliation by encouraging employers to rectify harassment when it does occur. Because the effectiveness of the employer's program would be relevant to the analysis, the employer would be encouraged not only to create sexual harassment programs, but also to systematically educate employees regarding the program's existence and to encourage employees to report harassment through the program's procedures. Lastly, the author argues this alternative approach would eliminate the problem exposed by Judge Jones's opinion in *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999). The employer would be able to prove the elements of the proposed defense by focusing on the existence of a harassment program and the fact that the harassing situation was immediately eradicated. Courts would not be faced with situations that require liability to be imposed on an employer who has taken conscientious steps to prevent and eradicate harassment. Instead, courts would be able to reward such behavior by allowing the employer to be absolved of any liability. The alternative approach proposed in the University of San Francisco Law Review article would clarify the situation in which all parties act reasonably, which was left muddy by *Ellerth/Faragher*, as evidenced by *Indest v. Freeman Decorating, Inc., supra.*

The law review article concludes by urging Congress or the Supreme Court to revisit employer liability for sexual harassment. In doing so, the emphasis should be placed on the employer, that is, on the party being faced with the prospect of liability.

C. *Fordham Law Review (March 2001)*

In an article entitled *Don't Train Your Employees and Cancel your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense*, 69 Fordham L. Rev. 1265 (March 2001), the authors in this study actually examined and analyzed prior case law in relation to the affirmative defense. The authors conclude that based on the courts' treatment of employees reporting and failing to report sexual harassment, it seems clear that the current affirmative defense does not accomplish the goals and principles set forth by *Ellerth* and *Faragher*. It makes little sense that employers whose employees fail to report are entitled to the windfall benefit of the affirmative defense, while employers who do more to encourage complaints and respond properly to such allegations are denied the defense. In addition to this anomalistic result, the authors conclude that such a policy encourages the undesirable behavior of trying to prevent employees from using reporting procedures. The authors also find equally troubling the courts' practice of deciding against victims who delay their reports because they attempted to resolve a situation informally or because they needed time to work through such an undesirable workplace situation. One way to encourage employers to eliminate sexual harassment is to change the nature of the affirmative defense by eliminating its second prong. The authors contend the affirmative defense should focus exclusively on employer conduct. To avoid vicarious liability, employers would have to exercise reasonable care to prevent and to stop sexual harassment. Employers would not have to prove that the employee acted unreasonably. The authors contend that "reasonable care" should consist of proscriptive measures that both prevent sexual harassment and encourage, or, at the

very least, do not discourage its reporting. In addition, "reasonable care" should also be measured by how an employer reacts to complaints of sexual harassment. The article contends that employers should be held liable for all harassment, whether the employee complained after three days or even three years, if the employer failed to respond to the complaint properly. Conversely, employers that properly respond to complaints should be able to avoid liability. Thus, employees would be under no undue time pressure to report harassment before they were ready, and an employer's liability would not be determined by an employee's decision whether to report.

The authors sharply criticize the *Ellerth/Faragher* affirmative defense because the two cases created a regrettable situation with the articulation of the two-prong affirmative defense. Employers are held liable when they do all that they can to prevent sexual harassment, but it nonetheless occurs and the employee reports it. They are liability free, however, when they do a lesser job of preventing harassment, and they happen to be fortuitous enough to employ someone who fails to take reasonable steps to report his or her claim.

The authors also argue that the dilemma created by the *Ellerth/Faragher* affirmative defense leaves employers trying to avoid liability with some rather uncomfortable guidance on how to do so. The authors contend the guidance given employers would now seem to be the following. First, an employer's entire effort to prevent sexual harassment should be limited to enacting and disseminating an anti-harassment policy. Employers should not engage in or should eliminate extensive preventative efforts such as expensive sexual harassment sensitivity training, or more particularly, harassment-reporting hotlines. While such measures may have positive effects such as reducing incidents of harassment, they could render unavailable the affirmative defense if such measures encourage employees to report. Because an employee's failure to report harassment is considered to be "unreasonable," and because some courts hold that

employers cannot prevail if the employee reports[2], employers seeking to limit liability have an incentive to do anything lawful to discourage employees from reporting. This incentive contradicts the purpose of the affirmative defense, which is to encourage employers to take measures to discourage harassment and to encourage employees to report all such incidents. The authors also contend that employers now have an incentive to hire and retain unreasonable employees. A prudent employer should invest the money saved by eliminating harassment sensitivity training and the harassment hotline into extensive background checking and personality screening of applicants. Another problem the article raises with the affirmative defense is that employees must report harassment before they are comfortable doing so because a delay may extinguish their claims. These incentives are clearly undesirable if the ultimate goal is to eliminate or reduce sexual harassment in the workplace. The article proposes a revised standard for the affirmative defense which places greater emphasis on the employer's actions so as to avoid creating perverse employer incentives, and simultaneously to increase prophylactic efforts to curb workplace harassment.

D. ***Various Courts' Commentary on the Problems with the Ellerth/Faragher Affirmative Defense***

An examination of lower courts' treatment of the issue reveals that although this Court did not clearly enunciate a rule regarding the effect on an employer's liability of prompt and effective corrective action when both the employer and the alleged victim have acted reasonably, there should be an amendment to the affirmative defense that makes such corrective action a complete defense to liability. Though not always addressing the issue in the same manner as EPI has in this case, the lower courts sometimes skirt around or manipulate their analysis to reach conclusions that in reality show the need for an amendment or modification to the affirmative defense.

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2. Which is the situation arising in this case involving EPI and Harrison.

In *Marsicano v. American Society of Safety Engineers*, 1998 WL 603128 (N.D. Ill. 1998), the employee reasonably availed herself of the employer's complaint procedures, the employer counseled the alleged offender, and the employer offered the employee an immediate reassignment. The employee chose to stay home from work and left voice-mail messages during non-working hours stating that she would not return to work. The district court found that by failing to return to work on reasonable terms and refusing to discuss alternate terms, she adopted an "unduly inflexible stance," leading to the conclusion that she unreasonably failed to take advantage of the preventive and corrective opportunities provided by the employer. In reality, the court was finding that the employer had reasonably acted and dealt with the problem.

In *Barua v. Credit Lyonnais — U.S. Branches*, 1998 WL 915892 (S.D. N.Y. 1998), a federal district court determined that if a victim complains of harassment on termination of the employment relationship, the victim has acted unreasonably if the employer reasonably attempts to correct the allegedly harassing behavior on the victim's complaint.

In *Coates v. Sundour Brands Inc.*, 164 F.3d 1361 (11th Cir. (Ga.) 1999), the Eleventh Circuit explained that without the victims' cooperation, the problem of workplace discrimination cannot be corrected. In a per curiam opinion, the court concluded that no genuine issue of material fact existed to support a finding that the plaintiff employee reasonably put her employer on notice of the harassment, or that when she did provide the employer with notice that the employer responded unreasonably to her complaint. Summary judgment for the defendant employer was affirmed. The pleadings in Coates predated the Supreme Court's decisions. The Eleventh Circuit did not apply the *Ellerth/Faragher* analysis and did not discuss whether the harasser was deemed the employee's supervisor for the purposes of vicarious liability. Circuit Judge Barkett's special concurrence, however, applied the *Ellerth/Faragher* analysis as controlling. The analysis in the special concurrence is based on the language of *Faragher and Ellerth*. The special

concurrence, which is often cited by other circuit and district courts, interprets the affirmative defense as a three-part inquiry:

> A court's assessment as to whether a defendant has proved this defense requires, first, an analysis of whether the employer has exercised reasonable care in preventing sexual harassing behavior. The court next directs its inquiry to whether the employee made reasonably sufficient use of available avenues to put the employer on notice of the problem. Finally, the court refocuses on the employer to determine whether the employer or its authorized agent, after receiving notice of the harassment, took adequate steps to abate it and prevent its recurrence.

Similar to the approach of *Coates*, the Fourth Circuit's support of an employer's attempt to resolve sexual harassment incidents independently of the courts, is demonstrated in *Watkins v. Professional Security Bureau Ltd.*, 201 F.3d 439 (4th Cir. 1999) in which the court found that an employee had acted unreasonably in refusing to pursue the employer's corrective efforts by not reporting a rape by her supervisor. The court noted, however, that even if the employee had acted reasonably, the employer would have been excused from liability, reasoning that while the Supreme Court did not speak to this issue,

> we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. * * * * *

In a plurality opinion authored by Judge Jones, the Fifth Circuit has held that if a defendant employer takes prompt remedial action as soon as the harassing conduct is brought to its attention, it should be absolved of liability. In *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999) (*Indest I*), the court was faced with a situation where the employer had exercised reasonable care in preventing and

promptly correcting sexual harassment and the plaintiff likewise had fulfilled her duty to complain promptly about the alleged harassment. Under these circumstances, the court concluded that judgment in the employer's favor was proper. The court based its conclusion on the following considerations:

(1) A plaintiff receives the benefit that Title VII was meant to provide by promptly complaining about inappropriate sexual harassment, thereby preventing the creation of a hostile work environment;

(2) An employer that promptly responds to complaints should be shielded from vicarious liability from the harassment because it has prevented the creation of a hostile work environment;

(3) In *Faragher* and *Ellerth*, the Supreme Court left intact its earlier ruling in Meritor that an employer is not automatically liable for a hostile work environment. To impose vicarious liability on an employer who takes prompt corrective action would undermine *Meritor* and Title VII's deterrent policy;

(4) *Faragher's* discussion of the avoidable consequences doctrine and an employee's duty to mitigate damages supports relieving the employer from liability. *Indest*, 164 F.3d at 265-66.

The Fifth Circuit noted that in deciding *Faragher*, the Supreme Court approved a group of cases in which courts had held employers liable for sexual harassment by a supervisor where the employers or their high-level agents or alter egos had actual knowledge of the harassment but did nothing to stop it. The Fifth Circuit distinguished those cases from the one before it. Judge Jones concluded that *Faragher* and *Ellerth* do not directly speak to the circumstances it had before it which was a case in which the plaintiff quickly resorted to [the employer's] policy and grievance procedure against sexual harassment, and the employer took prompt remedial action. While there was discussion of a case presenting only incipient hostile work environment, Judge Jones reasoning clearly addressed the

concept that an employer who promptly responds to complaints should not be subjected to vicarious liability. Judge Jones opinion also makes clear the conclusion that *Ellerth/Faragher* did not address the situation the Fifth Circuit had before it, which is the same issue that is involved in this case with EPI and Harrison.

Other courts have taken the *Indest* approach to an employer's vicarious liability for sexual harassment by a supervisor. In *Neal v. Electronic Data Systems Corp.*, 1999 U.S. Dist. Lexis 9732 (W.D. N.C. 1999) the North Carolina federal district court pointed out that the defendant employer had a reasonable policy in place, and took steps "reasonably calculated to result in cessation of the conduct" as soon as it had received a formal complaint, indicating that the defendant employer would not tolerate sexual harassment. Because of the employer's actions, the federal district court concluded the employee's failure to file her complaint earlier was unreasonable, and the employer was allowed summary judgment on the Title VII claim.

In *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999), the Eighth Circuit discussed the application of the *Ellerth/ Faragher* affirmative defense to single instances of "severe, unanticipatable [sic]" sexual harassment. Although the case was remanded, the court, citing *Indest*, noted that an employer might escape automatic liability in such cases if the harassment "does not ripen into an actionable hostile work environment claim until the employer learns that the harassment has occurred and fails to take proper remedial action."

III. THERE EXISTS CONFLICT BETWEEN THE UNITED STATES CIRCUIT COURTS OF APPEAL ON THE APPLICATION AND IMPLEMENTATION OF THE *ELLERTH/FARAGHER* AFFIRMATIVE DEFENSE

Since this Court rendered it decisions in *Ellerth/Faragher* and crafted the affirmative defense available to employers in supervisor sexual harassment situations where no tangible employment action was taken, the circuit courts have struggled with the application of the affirmative defense. The lack of clarity

and uncertainty of the affirmative defense, particularly in situations of the type involved in this case with EPI and Harrison have led to conflict. The conflict becomes obvious with an examination of circuit court opinions.

Fourth Circuit: *Watkins v. Professional Security Bureau, Limited*, 201 F.3d 439, 1999 WL 1032614 (4th (Med.) 1999). In this case, the Fourth Circuit concluded that the PSB, the employer, had established the second prong of the affirmative Defense. In discussing the issue, the Fourth Circuit in Footnote 16 stated:

> **Even if Watkin's [the employee] disclosure of the harassment to Dowling [employer] were adequate to establish that she took advantage of available preventive or corrective opportunities, our result would be the same. Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employee that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment — as PSB did here, . . . — would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense.**

The Fourth Circuit indicates that its conclusion regarding employer liability in the Footnote 16 is consistent with the "laudable purpose behind limitations on employer liability identified by this Court in *Burlington Industries.*"

Fifth Circuit: *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999) *(Indest I)*. *Indest* has been discussed under point I above. That discussion will not be repeated other than to again point out that Judge Jones concluded the *Ellerth/Faragher* affirmative defense did not address the fact pattern the Fifth Circuit had before it and that an employer that promptly responds to complaints should be shielded from vicarious liability from the harassment because it has prevented the creation of a hostile

work environment. Judge Jones's opinion and analysis would be applicable to any situation where an employer had acted reasonably irrespective of whether the employee had complained in a reasonably timely manner.

It should be noted that *Indest* is a plurality opinion in the Fifth Circuit. The other two judges on the panel did not join in Judge Jones's opinion. Judge Weiner issued his own opinion at *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999) (*Indest II)* He disagreed with Judge Jones: "I cannot agree with Judge Jones's conclusion that the Supreme Court's remarkably straightforward and perfectly consistent twin opinions in [*Faragher* and *Burlington*] do not control the present case-and, indeed all cases in which the plaintiff seeks to hold his employer vicariously liable for a supervisor's sexual harassment."

Sixth Circuit: *Williams v. General Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999). The Sixth Circuit stated: "it is no longer enough for an employer to take corrective action; employers now have an affirmative duty to prevent sexual harassment by supervisors."

Tenth Circuit: *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 85 Fair Emp.Prac.Cas.(BNA) 990, 80 Empl.Prac.Dec. ¶40,506, 2001 DJCAR 228 (10th Cir. (NM) April 30, 2001). The conflict between the Tenth Circuit and the Fifth Circuit is readily apparent in this case. In *Harrison v. Eddy Potash*, EPI argued to the Tenth Circuit the reasoning in *Indest* should be followed in this case because the issue of EPI having acted reasonably and having alleviated the sexual harassment was a part of the case. EPI had submitted a jury instruction patterned after *Indest*, which was refused by the Trial Court. In discussing whether Judge Jones's reasoning in *Indest* should be adopted, the Tenth Circuit openly disagreed with Judge Jones. At 248 F.3d pages 1025-26, the Tenth Circuit stated:

> **. . . we have effectively rejected the modified employer defense enunciated in *Indest*. In *Gunnell v. Utah Valley State College*, 152 F.3d**

> **1253 (10th Cir. 1998), the plaintiff filed suit against her employer under Title VII alleging, in part, that she had been subjected to sexual harassment by her supervisor. The district court (prior to the issuance of *Faragher* and *Burlington)* granted summary judgment in favor of the employer on the grounds that "the sexual harassment stopped after [plaintiff] complained" about it to the employer's personnel director. *Id. at 1259.* We reversed and remanded with directions to the district court to apply the two-pronged defense set forth in *Faragher* and *Burlington.* In doing so, we effectively rejected the position advanced in *Indest,* i.e., that an employer's prompt corrective action can be sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee.**
>
> **Third, even assuming that *Gunnell* did not resolve the issue, the reasoning of *Indest* is highly suspect and, in our view, should not be adopted. As outlined in *Indest II,* there is no reason to believe that the "remarkably straightforward" framework outlined in *Faragher* and *Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment. *Indest II, 168 F.3d at 796.***

Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998):

> See the Tenth Circuit's discussion of *Gunnell* in *Harrison v. Eddy Potash.*

Eleventh Circuit: *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999). The Eleventh Circuit did not decide the case on the basis of *Ellerth/Faragher*, however Judge Barkett

wrote a specially concurring opinion in which he addressed the application of the *Ellerth/Faragher* affirmative defense.

> **Under the framework established by the Court in *Faragher* and *Burlington Industries*, a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer liability under Title VII in cases where the harassment has not culminated in the taking by a supervisor of a tangible employment action against the victim.**

As the cases indicate, the circuits differ in their application of the *Ellerth/Faragher* affirmative defense in situations where the employer has acted reasonably in addressing sexual harassment and remedying sexual harassment that has manifested itself in the workplace. Circuit courts such as the Fourth, Fifth, and Eleventh are troubled by a literal reading and application of the second prong of the affirmative defense which will result in imposing liability upon an employer that has acted reasonably in the face of an employee's reasonably timely complaint. Those circuits clearly feel such a result is contrary to the goals of Title VII. Such a result is also contrary to the goals this Court stated in the *Ellerth/Faragher* decisions. Because of the very nature of the issue in this case, its nationwide importance to all employers and the obvious need for uniformity throughout the nation, this Court needs to grant EPI's Petition.

IV. THE NEED FOR CONSISTENCY ON A NATIONWIDE BASIS AND THE IMPORTANCE OF THE FEDERAL LAW APPLICABLE TO THIS CASE WARRANT THE GRANTING OF A WRIT

The implementation of the laudable goals of Title VII are of paramount importance. The effect Title VII has on employment throughout this country cannot be underestimated. Consistency is a recurring principle in the employment arena. Uniformity of federal law, as it affects the workplace, is likewise critical for both the employer and the employee. For employers engaged in business throughout the circuits, that expectation

should include a uniform application of employment rules under Title VII. With the uniform application of employment rules, the employer can, with consistency, implement policies that comply with those uniform rules and not face possible liability in one circuit for actions that would not create liability in another circuit.

Of equal importance is the question of whether the goals of Title VII are being achieved by the *Ellerth/Faragher* affirmative defense as it is currently formulated. EPI submits that it is not achieving that goal, but instead is having, and will continue to have, an opposite effect. Read literally, the affirmative defense places liability upon an employer in situations where both the employer and the employee have acted reasonably. Did this Court intend to create such a consequence? EPI thinks not. EPI submits the affirmative defense does not address situations such as the one involved in this case. If the affirmative defense does address such situations, it creates disincentive for employers to attack sexual harassment with the vigor expected. The affirmative defense needs to be re-examined and modified. This Court should grant EPI's Petition for that purpose.

CONCLUSION

For the reasons stated in this Petition, EPI's Petition for Writ of Certiorari should be granted on the issues presented.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED APRIL 30, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-2221

JEANNE HARRISON,

Plaintiff-Counter-Defendant-Appellee,

v.

EDDY POTASH, INC., a New Mexico corporation,

Defendant-Counter-Claimant-Appellant,

and

ROBERT L. BROWN,

Defendant-Counter-Claimant.

Appeal from United States District Court for the District of New Mexico (D.C. No. CIV-94-691-JP)

* * *

Appendix A

Before **SEYMOUR, GIBSON,*** and **BRISCOE,** Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Eddy Potash, Inc., (EPI) appeals from the district court's entry of partial summary judgment, as well as the district court's final judgment after trial, in favor of plaintiff Jeanne Harrison on her claim of Title VII sexual harassment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

The relevant underlying facts of this case were set forth in detail in our opinion in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997) (*Harrison I*):

> Plaintiff is a resident of Carlsbad, New Mexico. Defendant Eddy Potash, Inc., is a New Mexico corporation doing business in Eddy County, New Mexico. Defendant Robert L. Brown is a supervisor employed by Potash. Plaintiff began working for Potash as an underground potash miner in May 1992 and was the only female working with a crew of approximately 30 men [and was one of only two women miners in the entire operation]. Brown, who worked as the underground shift foreman, was plaintiff's supervisor and was in charge of

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* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

delegating duties and assigning work to plaintiff. According to plaintiff, Brown was the first person she was required to call if she was sick or wanted to take vacation. Brown was also involved in the disciplinary process.

The miners at Potash had a "buddy system" where each miner was assigned a "buddy" and each set of "buddies" worked together in a section of the mine away from other members of his or her crew. If a miner was not assigned a "buddy" on a particular shift, he or she was designated the "extra person" and was typically assigned to perform miscellaneous duties.

On May 4, 1993, Brown approached plaintiff in an isolated portion of the mine and attempted to kiss her on the mouth. She "pushed him away and told him he was crazy and to get the hell out of there." On the following day, Brown ordered plaintiff to leave her work station and accompany him to an abandoned unlit section of the mine to look for empty oil barrels he had allegedly previously noticed. After driving around the mine for awhile, Brown stopped the vehicle and walked around to the side where plaintiff was sitting. He tried to kiss plaintiff, to put his hands on her breasts and between her legs, and to unzip her pants. At the same time, Brown made various sexually suggestive comments to plaintiff, including asking her if she wanted to have intercourse or oral sex. Plaintiff pushed Brown

away and said "No" to each question. Brown "unbuttoned his pants and exposed his penis, put [plaintiff's] hand on his penis, and he ejaculated." Brown then drove plaintiff back to the section of the mine where she normally worked.

On May 15, 1993, plaintiff was working with her "buddy" to fix a broken machine. Brown arrived where they were working and ordered plaintiff to accompany him to the shop to look for a part for the machine. Before arriving at the shop, Brown stopped the vehicle in an unoccupied section of the mine, walked around to plaintiff's side of the vehicle, and again attempted to kiss her, to touch her, and to unzip her pants. Plaintiff repeatedly told Brown "No." Brown started walking back to his side of the vehicle, but turned around and returned to where plaintiff was sitting. He unzipped his pants and said, " 'Well, at least I can be happy.' " He then forced plaintiff to masturbate him. Brown then drove plaintiff to the shop and ordered the mechanic to drive her back to where she had been working.

On May 24, 1993, plaintiff was working a "graveyard" shift and was designated as the "extra person." Brown ordered her to accompany him to a section of the mine where they were experiencing a high methane gas reading, stating they needed to check the readings and make sure the section had been curtained off correctly. After they completed the work described, Brown drove

to a nearby section of the mine that was unoccupied, unlit, and had a low ceiling. As in the previous incidents, Brown walked around to plaintiff's side of the vehicle and attempted to kiss her, touch her, and unzip her pants. He also made various sexually suggestive comments. Plaintiff again told him "No" and attempted to push him away. Ultimately, Brown exposed himself and forced plaintiff to masturbate him.

On June 7, 1993, Brown ordered plaintiff to clean up around the shifter's office. After she had finished, Brown ordered her to accompany him in taking a load of materials to a section of the mine. On the way, Brown stopped the vehicle at an old unoccupied section of the mine and told plaintiff, "Look, I made us a bed out of [burlap] cloth." Brown asked plaintiff to lie down with him and she did. Brown repeatedly asked her to have sex with him and attempted to kiss and touch her, but plaintiff said "No." Brown then forced plaintiff to masturbate him.

During the period of time in which the incidents took place, plaintiff was aware of rumors indicating Brown was going to replace Larry Robertson, who was retiring in the safety office. The safety office was located on the surface and plaintiff believed if Brown went to that position she would not be in contact with him or under his supervision. However, when plaintiff returned to work on June 21, 1993, after a three-day break,

she learned Brown would not be replacing Robertson. At that point, she knew the "problem wasn't going to go away," and she "was going to have to do something to put an end to it." However, she was scared that no one in management would believe her and that she would lose her job.

On June 26, 1993, plaintiff arrived at work and learned her usual "buddy" had been assigned to work with another miner and she was the "extra person." Afraid Brown would again attempt to harass her, she completed a few of her assigned tasks and told Brown she was sick and was going home.

On June 27, 1993, plaintiff was again designated the "extra person." Brown ordered her to accompany him to shovel some tunnels in the mine. When they arrived, Brown again began harassing her in the identical manner as in the previous incidents. Plaintiff refused his advances and refused to masturbate him. Brown drove plaintiff back to his office and told her to go to her machine and work through lunch. Later that same day, Brown ordered plaintiff to help him clean his office. When they were alone, he again began harassing plaintiff, touching her, and repeatedly asking her to have sex. Plaintiff refused Brown's advances.

On June 28, 1993, plaintiff called the line foreman and told him she was having some problems and needed to take some vacation days

to finish out the remainder of her eleven-day shift. On her next scheduled work day (July 5, 1993), plaintiff called in sick. She also called in sick the following day.

On July 7, 1993, plaintiff called Dale Janway, a manager in the safety office, and told him what had happened with Brown. Janway told plaintiff "this is pretty big," and he would have to talk with Ken Leivo, the human resources manager. Later that afternoon, Leivo telephoned plaintiff and informed her she would be on administrative leave pending the outcome of his investigation. Leivo also asked plaintiff to prepare a written statement outlining what had happened. Plaintiff and Leivo talked on the telephone several times between July 7 and July 12. Leivo told plaintiff that Brown had admitted everything but said the incidents were consensual.

On July 14, 1993, Leivo issued a three-page "Determination and Disposition," noting plaintiff's and Brown's versions of what happened were substantially similar, with the exception that Brown alleged the encounters were consensual. * * * [T]he document indicated that plaintiff would be "made whole for all work time lost as a result of the matter," that she would be provided with counseling services and necessary medical treatment and prescription drugs, that she would be moved to a different crew in the mine, that Brown would be formally reprimanded for his involvement in the incident, that Brown would

> "be placed on permanent probation for any future activity of this type," and that Brown would be ordered to have no contact with plaintiff "other than that which might be absolutely necessary as part of his required duties."
>
> Although plaintiff remained on the Potash payroll for approximately one year, she never returned to work. On June 17, 1994, her employment was terminated due to a reduction in force at the mine.

Id. at 1440-42 (internal citations omitted).

Harrison filed suit against EPI and Brown alleging hostile work environment sexual harassment under Title VII of the Civil Rights Act of 1964 and violations of New Mexico tort law. A jury returned a verdict in favor of Harrison and against Brown on her state law claims of intentional infliction of emotional distress and battery, and awarded her compensatory damages of $102,500 and punitive damages of $40,000. The jury found against Harrison, however, with respect to her Title VII claim against EPI.

Harrison appealed from the judgment on her Title VII claim, arguing that the district court erroneously instructed the jury as to the requirements for imposing liability on an employer for sexual harassment perpetrated by one of its supervisory employees.[1] We agreed with Harrison and reversed and remanded for further proceedings on the Title

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1. Brown did not appeal from the judgment entered against him.

VII claim. *Harrison I*, 112 F.3d at 1451. Following issuance of its companion decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court granted EPI's petition for writ of certiorari, summarily vacated the decision in *Harrison I*, and remanded the action to this court for further consideration. *Eddy Potash, Inc. v. Harrison*, 524 U.S. 947 (1998). On remand, we again concluded that the district court improperly instructed the jury with respect to the standards for imposing liability on an employer for sexual harassment perpetrated by one of its supervisory employees.[2] *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1377 (10th Cir. 1998) (*Harrison II*). Accordingly, we reversed the judgment in favor of EPI and against Harrison on her Title VII claim and remanded the case to the district court for further proceedings.

On remand to the district court, the parties filed cross-motions for summary judgment. EPI asserted in its motion that it was entitled to summary judgment on Harrison's Title VII claim because, in its view, the uncontroverted facts developed at the first trial demonstrated that it could satisfy the affirmative defense outlined in *Faragher* and *Burlington*. Harrison, in her motion, argued that she was entitled to partial summary judgment on the issue of whether Brown's conduct was severe or pervasive enough to constitute actionable sexual harassment under Title VII. In support of her motion, Harrison asserted that the jury in the first trial, by finding in her favor on the two tort claims against Brown, effectively

2. We also rejected EPI's argument that it was entitled to judgment as a matter of law with respect to the affirmative defense outlined in *Faragher* and *Burlington*. *Harrison II*, 158 F.3d at 1377.

found that one or more of the encounters between herself and Brown were non-consensual. Harrison asserted that EPI was bound by the jury's finding in this regard because, "[a]lthough the judgment in [her] favor [wa]s only against . . . Brown, EPI and Brown [we]re privies . . . with a complete identity of interests." App. at 112. Harrison emphasized that "EPI's liability was predicated on the conduct of Brown," and that both Brown and EPI "were represented by the same counsel" and "put on a single, unified defense" during the first trial. *Id.* Finally, Harrison asserted that the two defendants shared a single, common defense during the first trial, i.e., that the encounters between Brown and Harrison were consensual. Thus, Harrison asserted, "the only liability issue left for the jury's determination [wa]s whether or not EPI [wa]s itself liable for . . . Brown's sexual harassment." *Id.*

The district court issued an initial order granting in part Harrison's motion for partial summary judgment and granting in part and denying in part EPI's motion for summary judgment. With respect to Harrison's motion, the district court concluded that EPI was "collaterally estopped from denying Harrison's lack of consent to Brown's physical sexual contact." *Id.* at 280. More specifically, the district court concluded that "[b]ecause one of the elements of battery is that it be non-consensual, and because the jury returned a verdict in favor of Harrison on her battery claim against Brown, the issue of Harrison's consent ha[d] already been fully litigated and necessarily decided." *Id.* With respect to EPI's motion, the district court concluded that, consistent with the opinion in *Harrison II,* there was "a genuine issue of material fact concerning EPI's affirmative defenses under

Faragher." *Id.* at 279. Because, however, Harrison conceded she was not entitled to punitive damages, the district court granted summary judgment in favor of EPI on the issue of punitive damages.

At the direction of the district court, the parties submitted proposed jury instructions on the issue of unwelcome sexual advances. After reviewing the parties' proposed jury instructions, the district court issued an order granting in its entirety Harrison's motion for partial summary judgment. In doing so, the court noted that EPI had conceded at the May 1999 pretrial conference "that the only physical contact between Brown and Harrison was of a sexual nature, so there [wa]s no genuine issue of material fact regarding the requirement that the conduct be sexually orientated." *Id.* at 285J. Thus, the court concluded, "the issues to be decided [we]re whether there [wa]s a genuine issue of material fact regarding the 'unwelcome' element of Harrison's hostile work environment claim, and whether Brown's conduct was sufficiently severe or pervasive as to alter the conditions of Harrison's employment and create an abusive working environment under both an objective and subjective standard." *Id.* After examining "the jury instructions, jury verdict, [and] trial transcript" from the first trial, the district court concluded "there [wa]s no genuine issue of material fact regarding Harrison's claim that Brown's conduct created a hostile work environment," and that the only issue to be decided at trial was "whether the affirmative defense set forth in *Faragher* and *Burlington* insulate[d] EPI from liability for Brown's conduct." *Id.*

At trial, the jury rejected EPI's affirmative defense and found in favor of Harrison on her Title VII claim. Because the parties had agreed, prior to trial, to be bound by the damage figures assessed in the first trial, the jury in the second trial did not consider or assess damages. EPI subsequently filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial. EPI argued, in part, that the district court erred in granting partial summary judgment in favor of Harrison "on the elements of sexual harassment." *Id.* at 339. The district court denied EPI's post-trial motion.

II.

Entry of partial summary judgment

EPI contends the district court erred in granting partial summary judgment in favor of Harrison on the issue of whether she was subjected by Brown to actionable sexual harassment. EPI forwards two arguments in support of its position. First, EPI contends that our mandate in *Harrison II* required the district court to conduct a trial de novo on all factual issues relevant to Harrison's Title VII claim, and thus effectively precluded the district court from granting summary judgment on any aspect of the Title VII claim. Second, and alternatively, EPI argues that it was improper for the district court, in granting partial summary judgment in favor of Harrison, to "rely upon any factual determination made by the jury in the first trial on any issue of liability." Aplt. Br. at 20.

Appendix A

We review de novo the district court's grant of summary judgment, applying the same legal standard as the district court. *E.g.*, *Trujillo v. Univ. of Colo. Health Sciences Ctr.*, 157 F.3d 1211, 1213 (10th Cir. 1998). Summary judgment is appropriate only if the admissible evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We also review de novo the district court's application of the doctrine of collateral estoppel. *See Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197 (10th Cir.), *cert. denied*, 121 S. Ct. 71 (2000); *see also Gonzales v. Hernandez*, 175 F.3d 1202, 1204 (10th Cir. 1999) (reviewing de novo a district court's entry of summary judgment barring claims under the doctrine of collateral estoppel).

Addressing EPI's arguments in order, we note that EPI failed to argue in the district court that our mandate in *Harrison II* precluded the district court from considering dispositive motions relevant to Harrison's Title VII claim. Indeed, EPI filed its own dispositive motion on remand. Thus, EPI has waived the argument for purposes of appeal. *See Vitkus v. Beatrice Co.*, 127 F.3d 936, 946-47 (10th Cir. 1997) (deeming issue raised first time on appeal waived). Even if we were willing to overlook EPI's waiver, we are not persuaded there is any merit to its argument. Nothing in the mandate of *Harrison II* precluded the district court from considering dispositive motions on any or all issues relevant to Harrison's Title VII claim. *See Guidry v. Sheet Metal Workers Int'l Assoc.*, 10 F.3d 700, 706 (10th Cir. 1993) ("When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court.") (internal quotations omitted).

Appendix A

EPI's second argument, i.e., that it was improper for the district court to grant summary judgment based upon any determination made by the jury in the first trial, is more difficult. In its initial order discussing Harrison's motion for partial summary judgment, the district court concluded that, based on the jury's verdict against Brown in the first trial, EPI was "collaterally estopped from denying Harrison's lack of consent to Brown's physical sexual contact." App. at 280. In its second order discussing Harrison's motion, the district court analyzed whether, as a matter of law, Brown's actions created an actionable hostile environment for purposes of Title VII. The district court noted that EPI had conceded during a May 1999 pretrial conference that the only physical contact between Brown and Harrison was of a sexual nature. Based upon this concession, the court concluded there was no genuine issue of material fact concerning whether Brown's conduct was sexually oriented. The court then reviewed the essential elements of the two tort claims against Brown and concluded, based upon the jury's findings on those tort claims, that Harrison had established as a matter of law that Brown's conduct was both "unwelcome" and objectively hostile. The court noted it was uncontroverted that Harrison subjectively believed that Harrison's conduct was hostile. Thus, the court concluded "there [wa]s no genuine issue of material fact regarding Harrison's claim that Brown's conduct created a hostile work environment," and the only issue of fact to be decided at trial was whether EPI was entitled to prevail on the *Faragher/Burlington* affirmative defense. *Id.* at 285J.

Although there are some conflicting statements in the district court's second order, it is clear that the district court

relied, to some degree, on the doctrine of collateral estoppel. As the Supreme Court has noted:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Ashe v. Swenson, 397 U.S. 436, 443 (1970). To apply collateral estoppel, the following elements must be established: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Dodge*, 203 F.3d at 1198.

EPI has challenged only the first element — whether the issue previously decided is identical with the one now presented.[3] In deciding this question, the jury instructions from the first trial are the "blueprint for determining the parameters of the first jury's verdict." *Id.* The jury at the first trial was instructed that, to recover on her claim of outrage, Harrison had to prove: (1) "[t]hat the conduct of

3. At no time, either in the district court or in this appeal, has EPI argued that it was not in privity with Brown for purposes of collateral estoppel.

. . . Brown was extreme and outrageous under the circumstances," (2) "[t]hat . . . Brown acted intentionally or recklessly," and (3) "[a]s a result of the conduct of . . . Brown, [she] experienced severe emotional distress." App. at 285K. With respect to the battery claim, the jury at the first trial was instructed that Harrison had to prove: (1) "[t]hat . . . Brown intentionally touched or struck [her]," (2) "[t]hat such contact by [Brown] was harmful or offensive," and (3) "[t]hat the contact was without consent of the plaintiff." *Id.* As the district court correctly concluded, the jury's verdict in favor of Harrison on these two claims means the jury necessarily found "that Brown intentionally touched or struck Harrison without her consent, that the contact was harmful or offensive to Harrison, that Brown's conduct was extreme and outrageous, that Brown acted intentionally and recklessly, and that Brown's conduct caused Harrison severe emotional distress." *Id.* at 285L.

The next question is whether any of the issues decided by the first jury are identical to those presented in Harrison's Title VII case against EPI. To prevail on her Title VII claim, Harrison had to establish, in part, that Brown's conduct toward her was (1) unwelcome, (2) based upon her sex, and (3) sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive working environment. *See Faragher*, 524 U.S. at 787-89; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-23 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-73 (1986). Obviously, although there is some common ground between these issues and those decided by the jury in the first trial, they are not identical. Nevertheless, as the district court noted, EPI's only defense to the Title VII claim, apart from its assertion of the

Faragher/Burlington affirmative defense, was that Harrison consented to Brown's sexual advances. Because the jury in the first trial decided this issue of fact against Brown and EPI, we conclude the district court was correct in determining that the doctrine of collateral estoppel prohibited EPI from relitigating that issue. In other words, the doctrine of collateral estoppel did not bar EPI from relitigating any of the essential elements of Harrison's Title VII claim, but it did prohibit EPI from relitigating the more narrow factual issue of whether Harrison consented to Brown's sexual advances.[4]

Having concluded that Harrison's lack of consent was established and controlling for purposes of her Title VII claim, the remaining question is whether there was a basis for granting partial summary judgment in Harrison's favor on any of the essential elements of that claim. The details of the encounters between Brown and Harrison, except for the consent issue, were unchallenged by EPI. Combined with the collateral estoppel effect of the first jury's resolution of the consent issue, it was therefore uncontroverted that, on several occasions over a seven-week period, Brown made aggressive sexual advances to Harrison and, against her will,

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4. The district court concluded that the verdict on the tort claims in the first trial established that, "on at least one occasion," Harrison did not consent to Brown's conduct. App. at 285M. Our view is somewhat different. In light of the testimony of Harrison and Brown, we believe the jury could only have reasonably reached one of two conclusions: either that Harrison consented to all of the advances, or that she consented to none of them. By finding against Brown on the tort claims, we believe the jury necessarily found that *all* of the incidents described by Harrison were nonconsensual.

intimately touched her body and forced her to masturbate him. In short, it was uncontroverted that Brown sexually assaulted Harrison on multiple occasions over a relatively brief period.

Based upon this uncontroverted evidence, we agree with the district court that Harrison was entitled to summary judgment on three elements of her Title VII claim. First, it was undoubtedly established that Brown's conduct was unwelcome, i.e., unwanted and distasteful. Second, there is no doubt that Brown's conduct was based on Harrison's sex. *E.g.*, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (discussing "based on sex" element and noting it includes sexual advances). Third, there were no genuine issues of material fact concerning whether Brown's conduct was sufficiently severe or pervasive as to alter the conditions of Harrison's employment and create an abusive working environment. In *Harris*, the Supreme Court concluded that, for purposes of this third element, the conduct in question must be judged by both an objective and a subjective standard-the conduct must be "severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive," and the victim must "subjectively perceive th[at] environment to be abusive." 510 U.S. at 21. *Harris* further concluded that, in determining whether a work environment is hostile or abusive, all of the circumstances of the case must be examined, including: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; (4) whether the conduct unreasonably interfered with the plaintiff's work performance; and (5) what psychological harm, if any, resulted. *See id.* at 23.

Here, it was uncontroverted that Harrison subjectively perceived Brown's assaults as severe enough to create a hostile and abusive working environment. From an objective standpoint, it appears clear that a jury could only have agreed. Although the assaults occurred over a relatively short period, they were extreme in nature, they were physically threatening and humiliating to Harrison (and would have been to any reasonable person in her position), they clearly interfered with her work performance (causing her to call in sick on several occasions to avoid contact with Brown), and it was uncontroverted that they caused psychological harm to Harrison.[5]

EPI's requested jury instructions

EPI contends the district court erred in refusing two of its tendered jury instructions. We review a district court's refusal to give a requested jury instruction under an abuse of discretion standard. *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 529 (10th Cir. 2000). In doing so, we consider de novo whether the instructions, as a whole, accurately informed the jury of the issues and the governing law.

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5. Although it is arguable that even one of the incidents, viewed alone, would have been sufficient to create a hostile or abusive working environment for purposes of Title VII, *see Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) (indicating that a Title VII plaintiff can establish actionable sexual harassment based upon "a single incident [of sexual harassment that] was extraordinarily severe"); *Torres v. Pisano*, 116 F.3d 625, 631 n.4 (2d Cir. 1997) ("Of course, even a single episode of harassment, if severe enough, can establish a hostile work environment."), we need not decide this issue.

Appendix A

See Fed. Deposit Ins. Corp. v. Schuchmann, 235 F.3d 1217, 1221 (10th Cir. 2000).

Indest instruction. EPI tendered, but the district court refused to give, the following instruction: "You are instructed that if you find that Plaintiff Jeanne Harrison promptly complained of Robert L. Brown's harassing conduct and that Eddy Potash promptly responded, disciplined appropriately, and stopped the harassment, then you should find for Eddy Potash." App. at 106. EPI contends that the tendered instruction, which was based upon *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999), correctly stated the law and should have been given to the jury.

The sole issue at trial in this case was whether EPI could avoid vicarious liability for Brown's misconduct by establishing its entitlement to the affirmative defense outlined in *Faragher* and *Burlington*. The *Faragher/Burlington* affirmative defense can only be raised if "no tangible employment action [wa]s taken" by the harassing supervisor against the plaintiff employee. *Faragher*, 524 U.S. at 807. If this preliminary requirement is met, the employer must establish, by a preponderance of the evidence, that (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* EPI argued in the district court, and continues to assert on appeal, that *Indest* correctly modified the *Faragher/Burlington* affirmative defense and that the district court should have recognized and adopted this modification.

Appendix A

In *Indest*, the plaintiff employee filed suit against her employer under Title VII alleging she had been sexually harassed by a member of the employer's upper management. More specifically, the plaintiff alleged that at a week-long convention where she was working, the alleged harasser on five occasions made crude sexual comments and sexual gestures to her. Following the fifth incident, plaintiff reported the harasser's conduct to her supervisor. In turn, the employer swiftly investigated the incidents and reprimanded the harasser. Although the harassment ceased, plaintiff filed suit against the employer alleging actionable sexual harassment under Title VII. The district court granted judgment as a matter of law in favor of the employer.

On appeal, a divided panel of the Fifth Circuit affirmed. The authoring judge purported to distinguish the case from *Faragher* and *Burlington* on the grounds that, "for purposes of imposing vicarious liability, a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment." *Indest*, 164 F.3d at 265. The authoring judge offered four reasons for doing so: (1) "when a plaintiff promptly complains about a supervisor's inappropriate sexual actions, she can thwart the creation of a hostile work environment"; (2) a "company's swift response to the plaintiff's complaint should have consequences for its vicarious liability exposure precisely because the company forestalled the creation of a hostile environment"; (3) "[i]mposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would . . . undermine not only *Meritor*

but Title VII's deterrent policy"; and (4) "*Faragher* implies that a plaintiff should not wait as long as it usually takes for a sexually hostile working environment to develop when the company has an effective grievance mechanism." *Id.* at 265-67. The authoring judge then proceeded to craft her own standard under which, if a plaintiff employee promptly complains of harassing conduct and the employer promptly responds, disciplines the harasser and stops the harassment, the employer is relieved of Title VII vicarious liability for the harasser's conduct. *Id.* at 267.

There are several major problems with *Indest.* First, it represents the views of only one member of the three-judge panel that decided the case. The other two members of the panel concurred in the judgment only, and one of the concurring judges wrote a separate, subsequently published concurring opinion expressly rejecting the analytical framework enunciated in *Indest.*[6] *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999) (*Indest II*) ("I cannot agree with Judge Jones's conclusion that the Supreme Court's remarkably straightforward and perfectly consistent twin opinions in [*Faragher* and *Burlington*] do not control the present case — and, indeed all cases in which the plaintiff seeks to hold his employer vicariously liable for a supervisor's sexual harassment."). Because, as pointed out in *Indest II*, the third member of the panel did not join either opinion, "neither enjoys a quorum and thus neither writing constitutes precedent in [the Fifth] Circuit." *Id.* at 796 n.1.

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6. *Indest II* proposed affirming the district court's judgment on the grounds that the conduct was not severe or pervasive enough to constitute actionable sexual harassment under Title VII. 168 F.3d at 796.

Second, we have effectively rejected the modified employer defense enunciated in *Indest*. In *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998), the plaintiff filed suit against her employer under Title VII alleging, in part, that she had been subjected to sexual harassment by her supervisor. The district court (prior to the issuance of *Faragher* and *Burlington*) granted summary judgment in favor of the employer on the grounds that "the sexual harassment stopped after [plaintiff] complained" about it to the employer's personnel director. *Id.* at 1259. We reversed and remanded with directions to the district court to apply the two-pronged defense set forth in *Faragher* and *Burlington*. In doing so, we effectively rejected the position advanced in *Indest*, i.e., that an employer's prompt corrective action can be sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee.

Third, even assuming that *Gunnell* did not resolve the issue, the reasoning of *Indest* is highly suspect and, in our view, should not be adopted. As outlined in *Indest II*, there is no reason to believe that the "remarkably straightforward" framework outlined in *Faragher* and *Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment. *Indest II*, 168 F.3d at 796.

Finally, even ignoring all of the problems already cited, the facts of Harrison's case are so far removed from the facts of *Indest* that the modified employer defense announced therein would not be applicable here. *Indest* involved a handful of crude sexual comments and gestures made during the course of a week-long seminar; in the words of the *Indest* court, it "was neither severe nor pervasive," *Indest*, 164 F.3d at

264, and, at most, created what that court characterized as "an incipient hostile environment." *Id.* at 265. Here, in contrast, Brown's misconduct was most certainly "severe," and undoubtedly created a hostile work environment for Harrison.

We therefore conclude the district court did not abuse its discretion in rejecting EPI's tendered instruction. In short, the tendered instruction was not an accurate statement of the governing law, and would have misled the jury in its determination of the issues.

Generalized fear of retaliation instruction. EPI asked the district court to give the following instruction: "Generalized fear of retaliation or repercussions related to reporting to an employer of sexual harassment in the workplace does not constitute reasonable grounds for an employee's failure to raise a complaint of harassment with her employer." App. at 107. The district court rejected the tendered instruction on the grounds that it "unduly emphasize[d] one narrow area of the law that [wa]s adequately covered" in the court's other instructions. *Id.* at 577.

The instruction tendered by EPI appears to be a correct statement of federal law. Although we have never addressed the issue, other circuit courts have expressly stated that, for purposes of applying the *Faragher/Burlington* affirmative defense, "[a] generalized fear of retaliation does not excuse a failure to report sexual harassment." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001); *see Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) ("[W]e conclude that an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to

the allegedly hostile environment."), *cert. denied*, 528 U.S. 1076 (2000); *Madray v. Publix Super Mkts., Inc.*, 30 F. Supp. 2d 1371, 1375 (S.D. Fla. 1998) ("An employee's generalized fear of repercussions cannot form the basis for an employee's failure to complain to his or her employer."), *aff'd* 208 F.3d 1290 (11th Cir. 2000).

The question, then, is whether the subject matter of the requested instruction was adequately covered in the district court's general instructions. *See Schuchmann*, 235 F.3d at 1222. Consistent with *Faragher* and *Burlington*, the district court instructed the jury that EPI would be liable for Brown's sexual harassment of Harrison unless EPI could prove, by a preponderance of the evidence, that (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "Harrison unreasonably failed to take advantage of any preventive or corrective opportunities provided by [EPI] or to avoid harm otherwise." App. at 314. Although the district court did not provide any further explanation of either prong of the affirmative defense, we conclude that this general instruction, considered together with the court's other instructions, properly conveyed to the jury the issues to be decided and the governing law. The instruction precisely tracked the Supreme Court's description of the employer's affirmative defense in *Faragher* and *Burlington*. *See Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Thus, we are unable to conclude the district court abused its discretion in rejecting the tendered instruction. *See generally United States v. Cerrato-Reyes*, 176 F.3d 1253, 1262 (10th Cir. 1999) (citing various cases in which it may have been preferable to give a tendered instruction, but where the district court did not err in refusing

to do so because the jury was not otherwise misled by the district court's general instructions).

EPI's motion for judgment as a matter of law

EPI contends the district court erred in denying its motion for judgment as a matter of law. According to EPI, the evidence presented at trial unequivocally demonstrated that it was entitled to prevail on the affirmative defense outlined by the Supreme Court in *Faragher* and *Burlington*. We review de novo a district court's disposition of a motion for judgment as a matter of law, applying the same standard as the district court. *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001). Such a judgment is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion. *Id.*

Focusing on the first prong of the *Faragher/Burlington* affirmative defense, we conclude the jury could reasonably have found that EPI failed to exercise reasonable care to prevent any sexually harassing behavior. On October 4, 1989, EPI drafted and disseminated to its supervisory personnel a written "policy statement on sexual discrimination and sexual harassment." App. at 702. At that time, EPI (through its Human Resource Manager, Kenny Leivo) instructed its supervisory personnel to "hold . . . meeting[s] with [their respective] crew[s] and read the policy statement to them," and "[p]ost the Policy on the bulletin board[s] after your meeting[s]." *Id.* Although there is no indication in the record that EPI's supervisory personnel failed to comply with these directions, the evidence indicates that non-supervisory personnel were not provided with copies of the policy, nor

were copies of the policy posted on all of the bulletin boards in the mine. In particular, it was uncontroverted that a copy of the policy was not posted in the changing room used by the women miners. More importantly, the evidence strongly suggests that, subsequent to October 4, 1989, the policy was largely ignored. Brown, the harasser in this case, testified without contradiction that no mention was made of the policy by EPI management after October 1989, and that no seminars on the subject of sexual harassment were ever held by EPI. Further, it was uncontroverted that, when Harrison began working for EPI in May 1992,[7] she was neither informed of the policy nor was a written copy of the policy included in the folder of written materials provided to her by EPI during orientation. Taken together, this evidence clearly would have allowed the jury to conclude that EPI exercised less than reasonable care in preventing sexual harassment by its employees. *See Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (noting "that mere promulgation of . . . a [sexual harassment] policy may well fail to satisfy the employer's burden" under the first prong of *Faragher*); *cf. Shaw*, 180 F.3d at 811-12 (concluding that employer exercised reasonable care to prevent sexual harassment where employer adopted an anti-harassment policy which it distributed to each of its employees, each employee was required as a condition of employment to read and comply with the policy, employer regularly trained managers regarding the policy, and supervisors were not isolated from higher management).

The judgment of the district court is AFFIRMED.

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7. Harrison had previously worked for EPI on two separate occasions, once in 1987 and once in 1988. At neither of those times did EPI have an official policy in place regarding sexual harassment.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED AND FILED MARCH 30, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 94-691 JP/WWD

JEANNE HARRISON,

Plaintiff,

vs.

EDDY POTASH, INC., a New Mexico corporation, and ROBERT L. BROWN,

Defendants.

JUDGMENT

On February 22-23, 2000, this case was tried by a jury on the sole issue of whether Defendant Eddy Potash, Inc. was liable for the sexual harassment of Plaintiff Jeanne Harrison by Eddy Potash, Inc.'s supervisor, Robert L. Brown. The jury found in favor of Plaintiff Jeanne Harrison and found that Defendant Eddy Potash, Inc. was liable for the sexual harassment committed by Robert L. Brown. The compensatory damages for which Eddy Potash, Inc. is liable had been previously established by a judgment against Defendant Robert L. Brown entered on February 8, 1996, as $102,500.00. Based on the jury's verdict rendered at the conclusion of the February 22-23, 2000 trial and the damage award established by the February 8, 1996 judgment,

Appendix B

JUDGMENT is hereby entered in favor of Plaintiff Jeanne Harrison and against Defendant Eddy Potash, Inc. in the amount of $102,500.00, plus interest at the rate of 6.197% per year from the date of entry of this judgment.

Plaintiff, the prevailing party, will be awarded allowable costs and reasonable attorney fees; Plaintiff must submit her motion to tax costs and her application for award of attorney fees in accordance with Fed. R. Civ. P. 54 and D.N.M.LR-Civ. 54.

s/ James A. Parker
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 31, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-2221

JEANNE HARRISON,

Plaintiff-Counter-Defendant-Appellee,

v.

EDDY POTASH, INC., a New Mexico corporation,

Defendant-Counter-Claimant-Appellant,

and

ROBERT L. BROWN,

Defendant-Counter-Claimant.

ORDER

Filed May 31, 2001

Appendix C

Before **SEYMOUR, GIBSON***, and **BRISCOE,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: s/ K. Fabrizio
Deputy Clerk

---

* The Honorable John K. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX D — RELEVANT STATUTE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, **42 U.S.C. §§ 2000e,** et seq. ("Title VII") as set forth below:

Section 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX E — RELEVANT JURY INSTRUCTIONS

DEFENDANT'S REQUESTED INSTRUCTION NO. 7

You are instructed that if you find that Plaintiff Jeanne Harrison promptly complained of Robert L. Brown's harassing conduct and that Eddy Potash promptly responded, disciplined appropriately, and stopped the harassment, then you should find for Eddy Potash.

COURT'S INSTRUCTION NO. 5

Defendant Eddy Potash, Inc. is liable for Robert L. Brown's sexual harassment of Plaintiff Jeanne Harrison unless Defendant Eddy Potash can prove each of the following elements of its defense by a preponderance of the evidence:

First: Defendant Eddy Potash exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

Second: Plaintiff Jeanne Harrison unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant Eddy Potash or to avoid harm otherwise.

If you find that Defendant Eddy Potash has met its burden of proving both of these matters by a preponderance of the evidence, then you should find for Defendant Eddy Potash.

Appendix E

If, on the other hand, you find that Defendant Eddy Potash has not met its burden of proving both of these matters by a preponderance of the evidence, then you should find for Plaintiff Jeanne Harrison.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 01-383

In The

Supreme Court of the United States

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Respondent Jeanne Harrison respectfully submits the following Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner Eddy Potash, Inc. ("EPI") pursuant to Sup.Ct.R. 15.

I. RESPONSE TO EPI'S STATEMENT OF THE CASE.

Ms. Harrison does not concur in EPI's statement of the facts. EPI presents as facts a very selective version of the evidence. These "facts" include matters that must have been resolved against EPI in order for the jury to have returned a verdict in favor of Ms. Harrison. With respect to the general facts of this case, Ms. Harrison refers the Court to the statement of the facts contained in the opinion of the Tenth Circuit below, which more accurately summarizes the facts of this matter. *See Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1016-18 (10th Cir. 2001); Petition for a Writ of Certiorari ("Petition"), App. A at 2a-8a.

EPI also makes misstatements of facts specific to the issues that would be before the Court if EPI's Petition for a Writ of Certiorari were granted. Some of EPI's alternative statements of the question presented assume that it acted reasonably to prevent harassment from occurring. As discussed below, EPI did not preserve these questions for review. However, to the extent that the Court might consider these issues, EPI did not act reasonably with respect to the dissemination of its sexual harassment policy, and EPI misstates the facts respecting this matter. While there was conflicting evidence at trial, the jury

found in favor of Ms. Harrison, and it must be assumed therefore that the jury believed Ms. Harrison's version of the facts.

Thus, the facts are as follows: Ms. Harrison was never given a copy of EPI's sexual harassment policy. When Ms. Harrison went to work for EPI, she was given a folder with various materials in it. However, EPI did not include a copy of the sexual harassment policy in the folder.

Further, EPI did not post, or did not maintain, the sexual harassment policy on the two bulletin boards where Ms. Harrison was most likely to see it. When Ms. Harrison went to work each day at EPI, she would go to the women's changing room to change into her work clothes. There was a bulletin board in the women's changing room. EPI's sexual harassment policy was not posted on that bulletin board during the time that Ms. Harrison worked for EPI. After the miners were transported underground, they would gather in the shifter's (supervisor's) office to get their instructions for the day. There was a bulletin board in the shifter's office. The sexual harassment policy was not on that bulletin board, either.

EPI also never verbally informed Ms. Harrison about its sexual harassment policy. When Ms. Harrison went to work for EPI in 1992, she was required to participate in an orientation program. EPI's policy against sexual harassment was not discussed in the orientation program. EPI held regular meetings for the miners called "safety huddles." EPI never discussed its policy against sexual harassment in the safety huddles. Robert L. Brown, Ms.

Harrison's supervisor and the person who sexually assaulted her, testified that he never spoke to his crew about the policy after it was issued in 1989. Kenny Leivo, EPI's human resources manager, testified that beyond posting, EPI made no efforts to educate its employees about the policy after the issuance of the policy in 1989 through the time of the harassment of Jeanne Harrison in 1993, a period of almost four years.

EPI also never trained its supervisors about sexual harassment or instructed them to review the policy with the employees periodically. Robert L. Brown testified that after the sexual harassment policy was issued in 1989, he heard nothing more from EPI about the policy or about sexual harassment. He never had any classes on the subject and never had any meetings with his superiors in which they discussed sexual harassment.

Finally, EPI took no special steps to ensure that women were aware of EPI's sexual harassment policy, even though it would have been a simple matter to do so, since only two women worked in the mine at the time Ms. Harrison returned to work for EPI in 1992.

EPI also makes several other misleading statements pertinent to dissemination and knowledge of the illegality of sexual harassment. EPI states that Ms. Harrison discovered the policy on a bulletin board in an area of the mine where she did not usually work, but fails to reveal that this only occurred after four of the five sexual assaults had already occurred. EPI also omits the fact that the reason Ms. Harrison did not read the policy at that time was because she assumed that there would be a copy of the policy in her orientation materials. When she got

home and looked, however, the policy was not there. EPI further states that Ms. Harrison knew that sexual harassment was illegal. Her testimony was only that she knew in a vague, general sense that harassment was probably illegal. Her knowledge was simply "common sense."

II. RESPONSE TO EPI'S REASONS FOR GRANTING THE WRIT.

A. EPI HAS NOT PRESERVED ISSUES FOR REVIEW.

The instant case involves the affirmative defense to employer liability under Title VII created by the Court in the cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The Court created the following rule of employer liability under Title VII:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities

> provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765, 118 S.Ct. at 2270; *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2292-93.

However, it is not clear what question EPI is raising in its Petition for a Writ of Certiorari respecting this defense. The question presented is stated in abstract, general terms as "[s]hould an employer be vicariously liable for supervisor sexual harassment" under certain specified circumstances. EPI's question presented does not state the question in relation to the circumstances of the case as required by Sup.Ct.R. 14.1(a) and does not specify the error that it alleges was made below. However, in its summary of the proceedings, EPI notes that it offered the following instruction:

> You are instructed that if you find that Plaintiff Jeanne Harrison promptly complained of Robert L. Brown's harassing conduct and that Eddy Potash promptly responded, disciplined appropriately, and stopped the harassment, then you should find for Eddy Potash.

EPI's Requested Instruction No. 7, Petition at 9 and App. E, p. 33a. The district court refused to give this instruction. Ms. Harrison assumes that EPI is complaining of the district court's refusal of Requested Instruction No. 7.

EPI's statement of the question presented is further confusing in that it sets forth alternative formulations of the question. Some versions of the question presented have an element of reasonable care by the employer to prevent harassment from occurring in the first instance and some focus solely on the employer's response once a

complaint of harassment has been received. To the extent that EPI is asking the Court to create a rule of law that an employer is absolved of liability, regardless of the reasonableness of the employee's conduct, if it (1) took reasonable care to prevent harassment and (2) corrected promptly any sexually harassing behavior, this issue was not preserved for review. EPI's Requested Instruction No. 7 says nothing about preventing harassment. EPI's Requested Instruction No. 7 would absolve an employer of liability based solely on its prompt remedial actions after the harassment has occurred, even if the employer had done nothing to prevent the harassment from occurring in the first instance. The only issue preserved for review is whether the district court erred in failing to instruct the jury that an employer is absolved of liability based solely on its prompt response to an employee's harassment complaint, as set forth in EPI's Requested Instruction No. 7. EPI's alternative formulations of the question presented in ¶¶ 1(b) and 1(d) were not preserved for review.

B. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

EPI states that it is "arguable" that the Court's decisions in *Ellerth* and *Faragher* did not address the issue of whether an employer is relieved of liability if it meets only the requirements of the first prong of the affirmative defense created by those cases. By creating an affirmative defense composed of two requirements, including a requirement that the employee unreasonably failed to take advantage of corrective or preventive opportunities,

the Court implicitly rejected the contention that meeting one requirement is, by itself, sufficient. *See Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 800-801 (5th Cir. 1999) (opinion of Judge Wiener).

EPI further argues that the Court should grant its Petition because even if its argument was disposed of by the decisions in *Ellerth* and *Faragher,* the application of the affirmative defense created by the Court does not promote the announced goals of the Court in those cases. This argument does not provide a basis for granting a petition for a writ of certiorari under the bases specified in Sup.Ct.R. 10. Moreover, EPI is wrong in concluding that its proposed modification of the affirmative defense would more successfully promote the goals stated by the Court.

The Court's announced purpose in creating the affirmative defense to the vicarious liability of employers under Title VII was two-fold. The defense was designed to "accommodate . . . Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees. . . . " *Ellerth,* 524 U.S. at 764, 118 S.Ct. at 2270; *Faragher,* 118 S.Ct. 2292, 524 U.S. at 807. Thus, the purpose of the defense was not just to create an incentive to employers to take action to prevent and promptly remedy sexual harassment, but also to provide an incentive to victims of harassment to act promptly to prevent or limit harassment. In *Faragher,* the Court explained the reason for requiring the second prong of the defense:

> The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate

> harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 231, n. 15 (1982) (quoting C. McCormick, Law of Damages 127 (1935) (internal quotation marks omitted). An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.

Faragher, 524 U.S. at 806-807, 118 S.Ct. at 2292.

The affirmative defense fashioned by the Court thus recognizes that the prevention of harassment is a two-way street. Harassment can be prevented or limited both by action of the employer and by action of the employee. EPI's proposed alternative would place the entire incentive and burden of preventing harassment on the employer and would eliminate any incentive for the employee to act promptly to prevent or stop harassment. EPI's proposed modification of the defense would thus undermine one of the policies of Title VII.

Further, under the formulation of the defense that was preserved for review, the only factor to be considered is whether the employer promptly responded to the harassment and stopped it. Under this defense, action to prevent harassment from occurring in the first place

would be irrelevant, and there would be no incentive for the employer to take such actions. Thus, EPI's proposed alternative formulation of the affirmative defense would also defeat Title VII's goal of "encouraging forethought by employers." Ms. Harrison submits that the Court's two-part defense advances Title VII's deterrent objectives, while EPI's proffered alternative destroys incentives for both the employer and the employee to take deterrent action.

Moreover, even if the Court were to consider EPI's formulation of the question presented that includes reasonable action by the employer to prevent harassment, EPI's arguments do not stand up to scrutiny. EPI argues that if the affirmative defense is defeated when the employee acts reasonably, there is a disincentive to the employer to take actions that would encourage the employee to act reasonably and promptly report harassment. However, there is no evidence in the record that the affirmative defense as formulated by the Court has in fact acted as a disincentive to employers to do all they can to prevent harassment or that it has caused employers to forego such measures as harassment training or hotlines. It is speculation on EPI's part that this is how employers will respond to the affirmative defense. There is ample reason to believe that the defense will not act as a disincentive for employers to do everything that they can to prevent harassment.

First, the promulgation and posting of a sexual harassment policy are not the only matters that a finder of fact will look to in determining whether the employer has acted reasonably to prevent harassment. If the employer did not give copies of the policy to its

employees, did not hold meetings to inform its employees about its sexual harassment policy, did not train its supervisors about sexual harassment, or provided a less convenient means of reporting harassment, these facts will be presented to the jury. Expert witnesses may be employed to testify as to what constitutes reasonable steps to prevent harassment and as to the steps similar employers take to prevent harassment. If the employer's actions to prevent harassment do not measure up, such an opinion may be offered to the finder of fact. If an employer actually eliminates anti-harassment measures in the wake of *Ellerth* and *Faragher* in order to trap employee-victims into not promptly reporting harassment, this will certainly be discovered and pointed out at trial and would be damaging evidence against the employer. By failing to take and maintain all available steps to prevent harassment, the employer thus runs the risk that it will be found to have acted unreasonably under the first prong of the affirmative defense. A prudent employer will take all reasonable steps to insure that it meets this first prong.

Second, it is likely that a prudent employer will view its goal not as escaping from liability after it is sued, but as preventing lawsuits from occurring in the first place by preventing harassment. Employers do not want to be involved in lawsuits. Lawsuits are expensive even if the employer ultimately prevails, and they are also costly in terms of diverting time and effort from the purpose of the employer, to put out a product or service and earn a profit. Training will in some cases prevent potential harassers from harassing. Moreover, if victims report harassment or situations that they feel might develop into

harassment right away, the harassing activity may be nipped in the bud, before the harassment becomes sufficiently severe or pervasive such that the employee might want to sue the employer. Even if there is a basis for a lawsuit, prompt reporting encouraged by the employer might limit damages. Thus, logic suggests that a prudent employer would not cut back on measures designed to prevent harassment because of the affirmative defense crafted by the Court. The affirmative defense crafted by the Court will not undermine the deterrent goals of Title VII.

In sum, there is no important question of federal law that has not been, but should be, addressed by this Court; the defense proposed by EPI would undermine, not advance, the deterrent goals of Title VII; and the Court's affirmative defense should not cause employers to fail to take reasonable measures to prevent harassment. The Court should accordingly deny EPI's Petition.

C. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

EPI also argues that there is a conflict between the circuits as to the application of the *Ellerth/Faragher* affirmative defense. An examination of the cases cited by EPI reveals that no such conflict exists.

EPI cites a footnote in the case of *Watkins v. Professional Security Bureau, Limited,* 1999 U.S.App. LEXIS 29841, 1999 WL 1032614 (4th Cir. 1999), *cert. denied,* 529 U.S. 1108, 120 S.Ct. 1961, 146 L.Ed.2d 793 (2000), stating that it is inconceivable that an employer who promptly and adequately responds to an incident of harassment

would be held liable on the grounds that it cannot meet the literal terms of the second element of the affirmative defense. However, the court had already decided that the employer did meet the literal terms of the second element of the affirmative defense. The statement in the footnote is dicta. Because the statement in the footnote is not a holding of the court, there can be no conflict between this decision and the decisions of other circuit courts. Moreover, this is an unpublished decision. As a result, the case has little precedential value, even within the Fourth Circuit. *See* 4th Cir.R. 36(c) (court will not cite an unpublished disposition absent unusual circumstances, and citation by parties is disfavored).

EPI also cites *Indest v. Freeman Decorating, Inc.* In *Indest*, two opinions were published. First, there was an opinion authored by Judge Jones, 164 F.3d 258, *superceded*, 1999 U.S. App. LEXIS 3125 (5th Cir. 1999), which EPI characterizes as a "plurality" opinion. Second, Judge Wiener, who had concurred only in the result of Judge Jones's opinion, filed a separate opinion, 168 F.3d 795. The third judge, Judge Furgeson, did not join in either opinion, but simply concurred in the result. 168 F.3d at 796 and n. 1; 164 F.3d at 260. Thus, the allegedly conflicting decision of Judge Jones is not only not a plurality opinion, since it did not get any more votes than the opinion of Judge Weiner, but because it did not receive the votes of a majority of the panel, it does not constitute precedent in the Fifth Circuit. 168 F.3d at 796, n. 1. Because Judge Jones's decision is simply the opinion of one judge with no precedential value, it does not create a conflict with the decisions of other circuits.

EPI cites *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999), but does not explain how this case creates a conflicting interpretation of the Court's affirmative defense. An examination of the case does not reveal any aberrations in its brief discussion of the Court's decisions in *Ellerth* and *Faragher*. *See Williams*, 187 F.3d at 560-61, 567. The case involved harassment by a co-worker, not a supervisor, so the court stated a different standard for determining employer liability. Moreover, the issues before the court in any case did not involve employer liability, but were whether there were fact issues for trial as to whether the harassment was severe or pervasive and whether the plaintiff subjectively perceived the work environment to be hostile. The issue of employer liability was not addressed by the court, 187 F.3d at 567, and the *Ellerth/Faragher* affirmative defense was not applied.

Finally, EPI cites a statement by Judge Barkett in his specially concurring opinion in *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999). Again, this is simply the statement of one judge, not a holding of the court. The statement cannot accordingly create a conflict with the opinions of other circuit courts of appeal. Further, Judge Barkett was not discussing whether the second prong of the Court's affirmative defense should be required when both the employer and the employee behave reasonably, but was discussing a supervisor's obligations to remedy co-worker harassment of which the supervisor has knowledge. Judge Barkett's omission of the second prong of the affirmative defense from his discussion in that context cannot reasonably be understood as disapproval of the second prong in the case of supervisor harassment.

EPI attempts to create the appearance of confusion and discord in the decisions of the circuit courts of appeal as to the application of the Court's affirmative defense where both the employer and the employee have acted reasonably. An examination of the cases cited by EPI, however, demonstrate that there is no conflict among the circuit courts of appeal on this issue. There is thus no basis for granting EPI's Petition.

III. CONCLUSION.

For the reasons stated herein, Respondent Jeanne Harrison prays this Court that EPI's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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